

FILED
BILLINGS DIV.

IN THE UNITED STATES DISTRICT COURT

2010 DEC 9 AM 9 44

FOR THE DISTRICT OF MONTANA

PATRICK E. DUFFY, JR.

BY _____

DEPUTY CLERK

BILLINGS DIVISION

UNITED STATES OF AMERICA,)

Cause No. CR 07-084-BLG-RFC

Plaintiff/Respondent,)

CV 10-143-BLG-RFC

vs.)

ORDER DENYING § 2255 MOTION

AND DENYING CERTIFICATE

TIRRELL LEWIS,)

OF APPEALABILITY

Defendant/Movant.)

On October 29, 2010, Defendant Tirrell Lewis filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. He filed a supplement on November 12, 2010. Lewis is a federal prisoner proceeding pro se.

Lewis claims no indictment was returned in his case and that his trial counsel was ineffective because he failed to challenge the absence of an indictment and failed to challenge the sufficiency of the evidence to support Lewis's conviction. Mot. § 2255 (doc. 65) at 1.

A grand jury returned an Indictment on June 22, 2007. Indictment (doc. 1) at

1-2. The evidence was sufficient to support Lewis's conviction. Possession is not the same thing as ownership. "A person has possession of something if the person knows of its presence and has physical control of it." 9th Cir. Crim. Jury Instr. No. 3.18; see also Trial Tr. Vol. 2 at 250:23-24. A juror could reasonably have believed Lewis's own statement to investigators that he possessed his girlfriend's AK-47 and ammunition for it while he was firing it on public land within view of two FBI agents. E.g., Trial Tr. Vol 1 at 130:18-134:5, 191:21-193:13. All of Lewis's claims are denied for lack of merit.

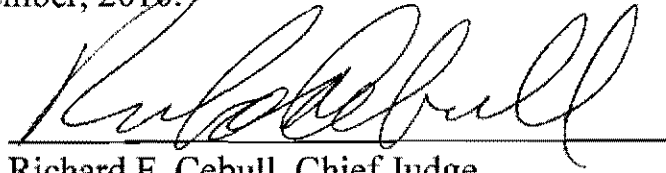
A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Lewis's claims are patently meritless and do not meet the standard. There is no reason to encourage further proceedings. A COA is not warranted.

Accordingly, IT IS HEREBY ORDERED as follows:

1. All claims having been denied, Lewis's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (docs. 65, 67) is DENIED;
2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Lewis files a Notice of Appeal;
3. The Clerk of Court shall ensure that all pending motions in this case and in

CV 10-143-BLG-RFC are terminated and shall close the civil file by entering judgment in favor of the United States and against Lewis.

DATED this 9th day of December, 2010.

A handwritten signature in black ink, appearing to read 'Richard F. Cebull', written over a horizontal line.

Richard F. Cebull, Chief Judge
United States District Court